IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 30 OF 2003

1. M/s.S.K.F. International,

2. Mr.Anil Sharma. ... Appellant.

V/s.

Mr. J.C. Nahata. ... Respondents.

V.M.Bharadwaj for the appellants.

None for the respondent.

CORAM : D.G.DESHPANDE, J.

DATED : 3rd February, 2005.

ORAL ORDER:

. Heard learned counsel for the appellants - original defendants. Nobody is present for the respondent - original plaintiff.

2. The respondent had filed summary suit on 7th July, 1997 against the appellants under order 37 rule 2 of Code of Civil Procedure, 1908 in the City Civil Court at Bombay being Summary Suit No.3869 of 1997 for recovery of sum of Rs.36,990/- out of which Rs.25,000/- was the principal amount. The suit was filed on the basis of demand bill of exchange dated 18th November, 1993. The defendants in their written statement raised plea of limitation. The trial Court has framed issue of limitation as Issue No.2. The contention of the defendants was that if

the bill of exchange was dated 18th November, 1993 then under Article 35 of the Limitation Act the suit has to be filed within three years from the date of bill of exchange. However, the suit came to be filed on 7th July, 1997 and, therefore, the suit on the face of it barred by limitation.

3. Learned counsel for the appellants further pointed out that the plaintiff has, in order to over come the difficulty of limitation raised two contentions in his plaint, firstly, payment by the defendants by way of cheques towards the amount of bill of exchange. My attention in this regard was drawn to paragraph Nos.10 and 11 of the plaint. In para-10 of the plaint it is pleaded that the defendants paid Rs.10,000/- on 19th November, 1994 and Rs.10,000/- on 13th December, 1994 to B.K.Mauriya as part payment and promised to pay the balance sum of Rs.5,000/- to B.K.Mauriya within a short time. In para-11 of the plaint, the plaintiff has stated that thereafter the said B.K.Mauriya endorsed the bill of exchange in favour of the plaintiff and intimation of the same was given to the defendants and the defendants promised to pay the amount of Rs.5,000/- along with Rs.20,000/- within a short time. Learned counsel for the

appellant also drew my attention to the record and proceedings and pointed out that two cheques as referred to above in paragraph Nos.10 and 11 are referred in two letters issued by the Union Bank of India and Bombay Mercantile Co-operative Bank Ltd. dated 12th February, 2002 and 19th August, 2002 respectively but in none of these letters there was any reference to any cheque issued by the defendants. He, therefore, contended that the cheques about which the plaintiff has made averments in paragraph Nos.10 and 11 were not the cheques issued by the defendants.

4. Secondly, learned counsel for the appellants contended that mere payment is not sufficient to give extension of period of limitation as there has to be an acknowledgment in writing under section 19 of the Limitation Act. Thereafter my attention was also drawn to para-7 of the plaint wherein the plaintiff has stated that two cheques dated 20th December, 1996 and one cheque dated 20th January, 1997 were issued by the defendants. According to learned counsel for the appellant, these cheques were dishonoured and, therefore, they do not constitute any acknowledgment.

5. He also relied upon two judgments, one of which is reported in AIR (3) 1951 SC 477 (**Sant Lal Mahton v. Kamla Prasad and others**) and other reported in 2000 (3) Mh.L.J. 843 (**Dalichand Jugraj Jain v. M/s.Madhu Wool Spinning Mills and others**). The Supreme Court in **Sant Lal Mahton** case has considered section 20 of the old Limitation Act, 1908. In that case, there was no payment nor any acknowledgment but there was an admission of payment in the written statement. While considering that aspect the Supreme Court observed as under:

> "....To claim exemption under S.20, the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that Section. The ground of exemption is not complete without this second element, and unless both these elements are proved to exist at the date of the plaint the suit would be held to be time-barred...."

Thereafter speaking about the facts of the case the Supreme Court found:

> "Where none of the payments were endorsed on the bond itself and there was no acknowledgment either in the handwriting of or signed by the debtors prior to the institution of the suit, but in the written statement filed in the suit the defendants admitted the payments specified in the plaint as made on the respective dates and the written statement was signed by the defendants it would not fulfil the

requirements of a signed acknowledgment as is contemplated by the proviso to S.20."

6. In the judgment of this Court in the case of **Dalichand Jugraj Jain** referred to above, same view was adopted which is in consonance with proviso to section 19 of the Limitation Act and it was held that if at all the acknowledgment has to be pleaded for getting extension of time of limitation, then there has to be specific plea in that regard and mere making of payment before the expiry of prescribed period would not be sufficient.

7. Proviso to section 19 of the Limitation Act provides that an acknowledgment of the payment should appear in handwriting of, or in a writing signed by, the person making the payment.

8. A perusal of the plaint clearly shows that there are no pleadings of the plaintiff to the effect that by a particular writing executed by the defendant before the expiry of prescribed period of limitation the defendants acknowledged their liability to the plaintiff. Therefore, what is lacking in the case is a most important aspect and considering the judgments of the Supreme Court and of this Court referred to above and the proviso to

section 19 of the Limitation Act it has to be held that there was no acknowledgment by the defendants in favour of the plaintiff before expiry of the period of limitation.

9. Secondly, so called payment by the defendants by cheque as it referred to in paragraph Nos.10 and 11 which enabled the plaintiff to seek extension of time is not the payment made by the defendants. Even the bank's certificate does not support the plaintiff's case that those cheques were issued by the defendants. Therefore, this case neither answers the pleading about acknowledgment nor there is written acknowledgment by the defendant in favour of the plaintiff either in the form of bill of exchange or in any manner whatsoever nor this is a case where defendants made payment by cheque towards their liability. The lower Court did not consider this aspect in its proper perspective and did not consider this important aspect at all and, therefore, came to a wrong conclusion. Since only one point regarding limitation is raised I decide it in favour of the appellants and this appeal is required to be allowed. Hence I pass the following order:

O R D E R

. The appeal is allowed.

. The impugned judgment and decree is set aside. Suit of the plaintiff is dismissed with costs. However, so far as appeal is concerned, there shall be no order as to costs as nobody is present for the respondent.

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